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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 468

BENJAMIN D. RITHOLZ,
Petitioner,
vs.
THE PEOPLE OF THE STATE OF MICHIGAN,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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OPINION BELOW

The opinion of the Michigan Supreme Court is reported at 359 Mich. 539 (official advance sheets only). A copy of the opinion is printed as an appendix to this Petition.

JURISDICTION

The opinion of the Michigan Supreme Court was filed on June 6, 1960. Petition for rehearing was denied on July 11, 1960. The jurisdiction of this Court is invoked under 28 U. S. C. par. 1257(3).

QUESTION PRESENTED

Where in a State Prosecution for Bribery, State Officials induced the Defendant to Commit the Offense, Does the Defendant's Conviction Violate the Due Process Clause of the Fourteenth Amendment?

CONSTITUTIONAL PROVISION INVOLVED

The Due Process clause of the Fourteenth Amendment to the Federal Constitution.

STATEMENT OF THE CASE

Petitioner was tried and convicted by a jury in the Circuit Court for the County of Ingham of the criminal offense of bribing officials of the Michigan Board of Examiners in Optometry, and sentenced to serve a prison term of not less than two and not more than four years pursuant to Sec. 117 of Act No. 328, Public Acts of 1931 (C. L. 1948 Sec. 750.117; Mich. Stat. Ann. Sec. 28.312). The Supreme Court of the State of Michigan, in affirming

the conviction and sentence, rejected certain claims of petitioner that, in his arrest and prosecution and in the course of his trial, he was denied rights guaranteed by the Fourteenth Amendment to the Constitution of the United States.

More particularly, it is petitioner's position that he was entrapped into making the "bribe" for which he was convicted by State officials and, hence, that petitioner's conviction denied him due process of law.

Petitioner's conviction, and the question of entrapment by State officials in this case as a violation of due process, rests primarily on the testimony of Dr. Julian A. Feiler, a member of the State Board of Examiners in Optometry from 1951-1955, to the effect that petitioner had on several occasions between November 1954 and August 1955, attempted to influence by bribery, Feiler's action as a Board member. Petitioner conceded that money changed hands between Feiler and petitioner on August 8, 1955, but only as a result of efforts by Feiler and other state officials to entrap petitioner by threatening him with economic reprisals in order to induce petitioner to make the bribe. This statement of facts will examine the testimony of Dr. Feiler and other state witnesses to establish that petitioner was entrapped by State officials in violation of the due process clause of the Fourteenth Amendment.

The entrapment of petitioner by State officials arose out of a five year relationship between petitioner and Dr. Feiler. A fair appraisal of petitioner's claim of entrapment in this case requires a full exposition of the evidence relative to that association.

Petitioner Benjamin D. Ritholz, a resident of Chicago, Illinois for the past fifty years, owned and operated optical

supply and lens grinding businesses throughout the United States; in Michigan petitioner has done business for more than ten years through the King Optical Company, a partnership of which petitioner was a partner.

The King Optical Company, (hereinafter referred to as King, with offices in several Michigan cities including Lansing, grinds lenses for eyeglasses for its customers pursuant to prescriptions issued by licensed optometrists. King is not licensed to prescribe glasses nor to treat eye diseases.

Dr. Feiler is a resident of the City of Flint, Michigan, and licensed to engage in the practice of optometry. In November, 1951, Governor G. Mennen Williams appointed Dr. Feiler to the five member State Board of Examiners in Optometry (hereinafter referred to as the Board), an independent State regulatory agency charged with the duty of regulating and licensing the profession of optometry in Michigan, and invested with broad powers of investigation and license suspension and revocation.[1]

Drs. Chauncey Howe and Clare L. Grigware are licensed and practicing optometrists, and also members of the Board. Members of the Board are appointed and removable for cause by the Governor and selected from optometrists licensed by the State of Michigan, many of whom, including Board members, are in direct competition with optometrists who prescribe glasses fabricated by King (P. App. 138a, 148a).[2]

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[1] Mich. Stat. Ann. Oct. 71 Pub. Acts 1909; Mich. Stat. Ann. Sec. 14.641, *et seq.*

[2] References to. App. —— are to pages of the printed Appellant's Appendix filed with the Michigan Supreme Court, which is a part of the certified record in this Court. Appellee also filed an appendix, which is also a part of the certified record.

In September 1954, charges were filed by the Board against Dr. Edwin L. Sanchick, an optometrist with offices at Lansing, Michigan on the ground that:

> "* * * (he) has been guilty of grossly unprofessional, unethical and dishonest conduct of a character likely to deceive the public, in that he has employed the King Optical Company as a 'capper' or 'steerer' to obtain business; and that said King Optical Company, by its employee and agent did on the 17th day of August, A. D. 1954 send this complainant to the said licensee, Edwin L. Sanchick, for a perscription for glasses."

Following hearings held before the Board upon these charges an order was issued in October, 1955, suspending Dr. Sanchick's license.[3]

Petitioner's conviction arose out of an association with Dr. Feiler begun after the inception of King operations in Michigan, but before Dr. Feiler's appointment to the Board and before Dr. Feiler's participation in the revocation of the license of Dr. Sanchick. Petitioner was convicted for corruptly offering Six Thousand ($6,000.00) Dollars to three members of the Board—Drs. Feiler, Grigware and Howe—and by paying them One Hundred ($100.00) Dollars each, with intent to influence their processing of the Sanchick complaint (App. 6a).

Petitioner's first contact with Dr. Feiler came in 1949 or 1950 at which time petitioner responded to an advertisement by Feiler for the sale of certain optical equipment (App. 175a). Feiler came to petitioner's place of business in Chicago to discuss the sale, and petitioner sent his

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[3] The Michigan Supreme Court eventually reversed this order of revocation in February 1957 on the ground that it was not supported by the evidence. *In Re Sanchick*, 347 Mich. 620.

foreman to Flint to inspect the equipment but no sale resulted from these negotiations. Petitioner ultimately paid Feiler the expenses incurred by the latter in the course of conducting these negotiations (App. 453a).

Sometime in 1951 or 1952, petitioner telephoned Dr. Feiler to request information relative to a patent infringement action concerning contact lens. As a result, Feiler came to Chicago to discuss the matter (App. 175-6). Feiler and his attorney offered to sell petitioner information thought relevant to the patent suit for the sum of $10,000.00, but the offer was refused. However, Feiler was paid his expenses (App. 176a, 236a, 455a).

On November 1, 1951, Governor Williams appointed Feiler to the Michigan Board of Examiners in Optometry.

In 1952 or 1953, Feiler again visited petitioner in Chicago and he testified that petitioner requested him to inspect petitioner's contact lens laboratory and render technical advice with respect to its operation, for which he received Three Hundred and Fifty ($350.00) Dollars for his professional services on that date (App. 178a). Feiler did not consider this transaction as conflicting with his duties as a member of the Board. Petitioner denied that he requested technical assistance from Feiler but asserted that Feiler had extorted this money from petitioner by reason of his official position vis-a-vis petitioner's business interests in Michigan (App. 459a).

The next contact between Feiler and petitioner occurred in 1953 (App. 178a, 460a). Feiler testified that this meeting was arranged in Chicago for the purpose of brokering a sale of lenses by a Detroit Optometrist to petitioner. Feiler admitted that he received expense money from petitioner in connection with this meeting (App. 178a, 179a,

180a) but petitioner testified that Feiler threatened to put him out of business in Michigan unless petitioner paid him Five Hundred ($500.00) Dollars (App. 459a-462a, 607a-610a).

The next contact between Feiler and petitioner occurred in November 1954, as a result of a telephone call allegedly initiated by petitioner, in the course of which petitioner asked Feiler whether he "could do anything about" the Sanchick case. Feiler replied that he "could not do anything", but did not report the incident to anyone (App. 180a, 181a). No money or other thing of value was mentioned. Petitioner testified that Feiler had called him and threatened revocation of licenses of other optometrists allied with petitioner unless petitioner paid Feiler Fifteen Thousand ($15,000.00) Dollars, which petitioner refused to do (App. 470a).

The next contact occurred during the first week of January, 1955, at which time Feiler testified that petitioner called him from Chicago and told Feiler that "* * * it would certainly be worth some money to see that the case were (sic) washed up or washed out, that it wouldn't be worth 3 or 4 hundred dollars but that I could put a zero behind that." Feiler reiterated that he couldn't do anything about the case; but despite Feiler's negative attitude, a Detroit meeting was arranged for the following week (App. 181a, 182a). Petitioner testified that Feiler had initiated the call and requested petitioner to meet Feiler in Detroit on January 12, 1955; that the meeting was "urgent", but the purpose was not articulated (App. 471a, 472a).

This conversation was the first one reported by Feiler to Michigan Police authorities who thereafter arranged with Feiler for monitoring the projected meeting (App. 182a-185a). In the course of preparation for this meeting

Feiler was advised by State Police officials to be "very normal in this relationship * * * not do anything that would entrap Mr. Ritholz * * *" (App. 185a). Petitioner came to Detroit and met with Feiler on January 12, 1955 at a Detroit hotel. The conversation was monitored by the State Police.

In the course of this conversation, petitioner asked Feiler if he would "wash this out (the Sanchick case) just like anything else," and that since petitioner would have to pay attorneys if it was not worked out, he would agree to pay Feiler the amount saved (App. 188a). Respondent interpreted this conversation as revealing petitioner to be the aggressor—bribor. Petitioner contended that he had decided to capitulate to Feiler's previous extortionate demands, and thus ensure that Feiler's threats to destroy petitioner's business by effecting revocation of licenses of optometrists associated with petitioner in Michigan would not be consummated; that he had suggested that the Sanchick case be "worked out" because he believed that the complaint had been originally promoted by Feiler only for the purpose of furnishing bargaining power for later extortion.[4]

No arrest was made following this monitored conversation.

Feiler testified that on March 27, 1955, while the Board was holding an official meeting, petitioner phoned to tell him that he would be in Detroit later that day and asked Feiler to meet him to discuss the Sanchick case. Drs.

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[4] Petitioner testified that, after appointment to the Board, Feiler met Ritholz in Chicago and said: "As a member of the Board I could do you a lot of good and a lot of harm" (App. 458a). Petitioner refused to pay Feiler any money (App. 465a). The Board subsequently filed its complaint against Dr. Sanchick in September, 1954 (App. 470a).

Howe and Grigware were in Feiler's room when petitioner called and Feiler reported the call to them (App. 193a-194a).[5]

Feiler later went to petitioner's hotel room where petitioner again allegedly asked Feiler to "work out" the Sanchick case and told Feiler it would be worth a thousand dollars.[6] Feiler again stated he could do nothing for petitioner (App. 195a). Petitioner requested a meeting for the next day. Feiler returned to his hotel and contacted the Michigan State Police and was advised by them, "not to have any further contact with Mr. Ritholz" (App. 195a).

The following day, petitioner called Feiler and asked for a meeting to discuss the Sanchick case. Feiler again stated he could do nothing but told petitioner that he would be shopping at a named store. There he met petitioner and accepted Five Hundred ($500.00) Dollars from petitioner without thereafter reporting it until September 20, 1955, more than a month after petitioner's arrest on August 8th (App. 197a-200a).[7] Petitioner testified that

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[5] The minutes of this meeting disclose the efforts of the Board to defeat legislation relative to "capping and steering" favorable to the King Optical Company. Petitioner was expressly mentioned in this connection in the minutes, in a way which suggests that the Board was hostile to proposed legislation favored by petitioner, affecting the regulation of the practice of optometry (App. 168a, 169a).

[6] Petitioner was apparently the beneficiary of a falling market. In earlier testimony Feiler stated that petitioner had offered $3,000 or $4,000 on January 5, 1955 (App. 182a).

[7] For this default Feiler was ultimately removed from office by Governor Williams (Supplemental Brief and Appendix for Appellant, p. 58. This document is included in the certified record.)

Feiler had demanded the Five Hundred ($500.00) Dollars to "swing" a vote on the five man Board and that he had acceded to this demand (App. 479a-480a).[8]

When asked why he had arranged to see petitioner the day after he had been told by the State police not to contact him further, Feiler replied:

> "• • • We had previous evidence on him, and I wanted to get him, if I could, and this was just a method of having him on the hook and letting out the line a little bit and playing him until we finally would catch him, which we did, fortunately." (Appellant's Supplemental Brief and Appendix pp. 40sa-41sa.)

Feiler testified that petitioner next contacted him in Flint by phone from Chicago in early June, 1955 again asking Feiler to "work out" the Sanchick case. Feiler advised petitioner that he couldn't do anything and suggested that petitioner call "another member of the Board or other members of the Board, if he wanted something done" (App. 203a). Feiler explicitly suggested the name of Board member Dr. Grigware (App. 204a).

The next (and last) meeting between Feiler and petitioner, prior to petitioner's arrest, occurred on August 8, 1955, in a Lansing Hotel. According to Feiler, the meeting was preceded by a number of phone calls from petitioner in which petitioner continued to ask Feiler to work out the Sanchick case, but no money was mentioned and on each occasion Feiler advised petitioner that he could do nothing (App. 206a, 207a). Feiler reported these phone calls to the State Police.

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[8] Petitioner testified that Feiler had apprized him of the possibility of coopting at least one member of the Board, at the September 1955 Chicago meeting (App. 465a).

On August 3, 1955, Feiler and Board member Howe, were summoned to a conference at Lansing, the State Capitol, by Assistant Attorney General Irving Beattie. At this conference a detailed plan was outlined for entrapping petitioner. Beattie specifically instructed the conferees "* * * we didn't have to be too careful about entrapment" (App. 410a).

Pursuant to the plan, Feiler telephoned petitioner in Chicago and informed him "I think I'm getting this thing lined up", then by way of soliciting a meeting with petitioner, asked him "When can we meet?" (App. 420a). Petitioner suggested a Detroit meeting for August 7th and Feiler then asked if petitioner "was going to bring the stuff with him." There was discussion about a "middle man" and Feiler said: "Bring the money with you. I do not want a middle man. I am the middle man" (App. 211a, 420a, 435a).

It was in this conversation that Feiler suggested the payment of a specific sum of money to bribe a majority of the Board. He testified:

> "Q. I see. All right. Now, did you mention any sum of money in your talk with Mr. Ritholz over the phone?
>
> A. I believe that I did, sir.
>
> Q. Did you do that at the suggestion of anyone?
>
> A. Yes, sir.
>
> Q. By whom? Who made that suggestion?
>
> A. Mr. Beattie.
>
> Q. And you mentioned a sum of money, right?
>
> A. Yes, sir.
>
> Q. Did you mention the sum of money that was to be paid to you by Mr. Ritholz?
>
> A. I believe *I mentioned the sum of money that would have to be paid to the Board members.*
>
> Q. To the Board members?
>
> A. Yes, sir.

Q. And what was that sum of money that you mentioned in that telephone conversation, based upon your best recollection?

A. To the best of my recollection now, *I stated that each Board member or the three Board members were to receive $3,000.00 each.*

Q. And a total of $9,000.00?

A. To the best of my recollection, yes, sir" (App. 283a, 284a). (Emphasis added.)

Petitioner testified that the next day, August 4th, he again spoke with Feiler by long distance telephone concerning the dismissal of a Federal Court anti-trust case instituted by petitioner against members of the Board; that Feiler agreed it should be included as a part of the deal; and that Feiler reminded petitioner to bring the $9,000—$3,000 for each Board member (App. 488a). When petitioner complained, Feiler said the "boys" (Board members) had originally wanted $5,000 each but that Feiler had been able to reduce their demands (App. 488a).

Feiler's testimony on this August 4th call agrees in substance with petitioner's but does not include any mention of specific money amounts (App. 212a).

On August 5th, petitioner called Feiler and, according to Feiler, asked that the other two members who, together with Feiler constituted a majority of the Board, be present at the projected August 7th meeting, and that Feiler disclose their identity to petitioner, but Feiler refused to identify the other members (App. 213a).

On August 7th, in another monitored phone conversation with Beattie and the State Police present, Feiler called petitioner in Detroit to advise him that the other members of the Board could not be in Detroit and agreed to meet petitioner the following night in the Olds Hotel in Lansing (App. 214a, 215a).

Assistant Attorney General Beattie and the State police thereupon summoned Board members Grigware and Howe to Lansing where the latter were briefed as to their roles at the meeting with petitioner.[2] They were instructed in substance "* * * if possible get Mr. Ritholz to pay us some money, and as soon as you get it, to go to the room where the officials were and show it to them" (App. 59a) and that they "did not have to be too careful to entrap" (App. 290a).

On August 5, 1955, petitioner had contacted Pinkerton detectives, told them "that he was anticipating somebody extorting money from him", and employed them to tape record the meeting. This they did by placing a tape recorder under the supervision of three Pinkerton operatives in the hotel room adjacent to petitioner's[3] (App. 45a, 347a-350a).

At the hotel meeting petitioner gave Feiler three one hundred dollars bills; the latter then gave one each to Howe and Grigware, with the understanding that the three Board members would terminate proceedings against Sanchick. The Board members then left petitioner's room, reported to the police in an adjacent room, and the latter then arrested petitioner in his room and, in response to petitioner's demand to know the reason for his arrest, told him that the charge was bribing State officials. Petitioner responded: "It should have been the other way"

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[2] Dr. Howe of Hillsdale, Michigan, repeatedly refused State police and Attorney General efforts to bring him to Lansing for the meeting with petitioner and acquiesced only after three calls from different State officials (App. 129a, 130a).

[3] After contacting the Pinkertons, petitioner consulted Mr. Marcus Simon, a Detroit attorney as to the propriety of taking recordings to obtain evidence of Feiler's extortion and Mr. Simon told him "go ahead" (App. 617a).

(App. 493a). Petitioner advised the police of the presence of three Pinkerton detectives in the adjoining room. The police first placed the detectives under arrest but, on ascertaining their identity, released them but confiscated the recording machine and equipment (App. 54a).

HOW THE FEDERAL QUESTION WAS RAISED

At the trial the issue of entrapment was raised and considerable evidence was introduced in support of the claim (note extensive citations to the record supporting petitioner's claim of entrapment in the Statement of the Case).

Although the Trial Judge gave a request to charge to the jury on the issue of entrapment (App. 677a-678a), the matter was not argued to the jury by petitioner's counsel. Instead, he stated to the Court "We will claim that (defense of entrapment), your Honor, even though we didn't argue it" (App. 671a).

On appeal to the Michigan Supreme Court, petitioner raised the defense of entrapment as a due process issue in the Statement of Questions Involved in his brief, as required by Rule 67 of the Michigan Court Rules (App. Brief on Appeal p. v, par. 6), and presented extensive arguments in support thereof (App. Brief on Appeal pp. 114-126).

In the Counter-Statement of Questions Involved in respondent's brief in the Michigan Supreme Court, pursuant to Rule 68 of the Michigan Court Rules, the issue was stated as follows: "10. Was the defendant deprived of due process of law, because, as he claimed, there was * * * entrapment by police and prosecuting officials * * *" (Appellee's Brief and Appendix p. VII). The argument upon this issue appears on pp. 79-84 of the same brief.

In its opinion, the Michigan Supreme Court neither discussed nor decided the entrapment issue. It ignored it. Consequently, petitioner in his Application for Rehearing to the Michigan Supreme Court, pointed out that the entrapment issue as a denial of due process was not passed upon by that Court and requested consideration. (Application for Rehearing pp. 2-10). The Michigan Supreme Court denied the Application for Rehearing without opinion.[11]

REASONS FOR GRANTING WRIT

The facts in this case disclose that petitioner, engaged in a competitive business involving the manufacture and sale of eyeglasses, was threatened with destruction of his business by his competitors sitting as members of a State Board which regulated and licensed the optometrists whose good will was essential to the continuation of his business. For this was the significance of the revocation proceedings instituted by the Board against Dr. Sanichick.

Not only did the Board charge that Dr. Sanichick was guilty by reason of his relationship with the King Optical Company in prescribing glasses to customers referred by King, but implicit in the charge was the threat that any optometrist in Michigan who prescribed glasses for customers referred by King would be similarly dealt with. Although the Michigan Supreme Court ultimately found

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[11] The issue of entrapment, though not discussed by the Michigan Supreme Court, must have been decided adversely to petitioner, since a decision on this issue favorable to petitioner, would have resulted in a reversal of his conviction. This Court has the duty to examine the record independently to "determine whether the federal question was necessarily passed upon by the State Court." *Honeyman v. Hanan*, 300 U. S. 14, 18, 57 S. Ct. 350; *Napue v. Illinois*, 360 U. S. 264, 271-2, 79 S. Ct. 1173.

that the relationship was not in violation of the law (*In re Sanchick, supra*), it is understandable that, *at the time*, petitioner would be concerned that his competitors' economic power exercised through a state agency which, by statute, was controlled by these same competitors, could result in the destruction of his business.[12]

It is in this context that petitioner's overtures to Feiler (or, as petitioner asserted, Feiler's overtures to petitioner) must be judged in relation to his claim of entrapment. Although the testimony as to petitioner's suggestion to Feiler for washing out the charges against Dr. Sanchick (as testified to by Feiler) were crude and assertive, they were never of such a character as to constitute bribery. If they had been, it is clear that criminal proceedings would have been brought against petitioner in January, 1955. For it was then that the police had monitored the conversation between petitioner and Feiler at a hotel room in Detroit, where petitioner asked that the Sanchick case be washed out and that he would pay Feiler the amount saved as attorney fees if this were done.

Yet, it was not until after the hotel meeting of August 8, 1955, that the police and the Attorney General concluded that petitioner could be charged with bribery. The change in character between the two meetings, we submit, lies in the criminal ingredients which the State introduced into

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[12] The Board has no jurisdiction over dispensing opticians such as King. For this reason King can engage in advertising the price of glasses but optometrists such as Dr. Sanchick are not permitted to do so. In this situation, if optometrists could be intimidated into refusing to accept referrals from King, the Board would be able to economically blockade King and accomplish indirectly what, by statute, it could not do directly. The *Sanchick* record at p. 216 (*In re Sanchick, supra*) shows that the Board's investigation of Dr. Sanchick in August, 1954 was "primarily for the purpose of trying to obtain enough evidence for a court case against King Optical Company."

the August meeting in order to entrap petitioner into the commission of the crime.

Petitioner's overtures to Feiler in the January hotel meeting, as well as in conversations prior to and subsequent thereto, were understandable reactions of a businessman being pushed to the wall by his economic competitors in a power move directed from the vantage point of State authority (disregarding the motive of extortion unsuccessfully advanced by petitioner). Foolish and amateurish though this overture may have been, it was not bribery.

It was in recognition of this lack of criminal action by petitioner, that the Assistant Attorney General advised the Board members on August 3rd and 7th, in preparation for the meeting of August 8th, "we didn't have to be too careful about entrapment." It would be difficult to find better evidence, than this statement, of knowledge by the State that a citizen would not violate a law if left to his own devices, but that he could be made to engage in the criminal act only through entrapment.

Three ingredients were deemed necessary by the Michigan Attorney General to entrap petitioner: First, to bring him into Michigan; second, to have him offer a specific sum of money; and third, to bring in Board members other than Feiler as willing to accept bribes.[13]

It was in accord with this strategy that Feiler, at the direction of the Assistant Attorney General, phoned petitioner in Chicago on August 3rd. First, he asked petitioner to a meeting in Michigan; then, holding out the lure

[13] Feiler had first suggested in May that petitioner "call another member of the Board, or other members of the Board if he wanted something done * * * I suggested that he call Dr. Grigware" (App. 203a, 204a).

of business security against economic strangulation represented by the Sanchick case, he informed him that three Board members, a majority, were ready to accept $3,000 each to dismiss the proceedings.

The trap was now baited with a Board majority of three members willing to accept money and dismiss the charges against Sanchick. It was this trap which the State sprung on petitioner. The State provided the stage-set, the actors and the props for the commission of the crime, and the petitioner reacted in accordance with the prearranged script.

The play that had proved to be a farce when enacted in the monitored hotel room in Detroit in January, became a tragedy after the script had been rewritten in another monitored hotel room in Lansing in August by an Attorney General whose guide was: Don't "be too careful about entrapment."

Much emphasis is placed by the State upon petitioner's payment to Feiler of Five Hundred Dollars in March, 1955. But two considerations militate against this incident constituting an answer to petitioner's claim of entrapment.

First, on the previous day at a meeting of the Board, Feiler was instructed by the State Police and by the Board itself "not to have any further contact with Mr. Ritholz" (App. 195a). Yet Feiler not only received Five Hundred Dollars from petitioner on the day following receipt of these instructions, but he retained the money without notifying anyone until September, six months after he had received the money and a month after petitioner's arrest (App. 200a). This conduct on the part of Feiler is completely inconsistent with the State's position that Feiler

was at all times acting as a decoy for a potential bribor; rather it supports petitioner's claim of extortion.[14]

Second, the State police and the State prosecuting official who joined together to entrap petitioner were unaware of the payment of this $500.00 when they made and carried out their plan. If it is the improper action of the police rather than the motivation of the defendant which is condemned by the invocation of the entrapment doctrine, then the State may not invoke an incident of which it knew nothing to provide *ex post facto* justification for its illegal acts. This indeed is the meaning of the concurring opinions in *Sherman v. U. S.*, 356 U. S. 369; 78 S. Ct. 819, and *Sorrells v. U. S.*, 287 U. S. 435; 53 S. Ct. 210.[15]

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[14] This Court need not reject the Jury's verdict to believe petitioner's testimony relative to extortion by Feiler before June 1955. This is so because, although the trial Court sent the petitioner's claim of extortion to the jury on the question of petitioner's intent on August 8, 1955 (App. 676a), petitioner testified to no *openly extortionate* demands for money by Feiler after March 1955. Feiler's conversations with petitioner after that date, as testified to by petitioner, were not attempts to extort. In fact, it is petitioner's position that the uncontroverted evidence establishes that although Feiler was attempting to and did extort money from petitioner through the March episode, thereafter, beginning with the next episode in June, 1955, Feiler switched from extortion to entrapment by economic coercion. In view of the fact that petitioner never claimed that Drs. Howe or Grigware were attempting exortion as distinct from Feiler's *recital* to petitioner of the willingness of Howe and Grigware to accept bribes, and keeping in mind also that Feiler's testimony establishes June, 1955 as the date Feiler proposed that petitioner approach Howe and Grigware, the Jury could have found that Feiler ceased extorting in March 1955 and thereafter, simply acted as a "contact man" between petitioner and Grigware and Howe to arrange bribe of the latter two. See testimony of Feiler suggesting his role as "contact man" (App. 210a, 211a; also Supplemental Brief and Appendix p. 36sa).

[15] Analysis of the Michigan decisions discloses that the defense was originally recognized chiefly in order to vindicate a strong public policy against police solicitation or participation in crimes. This policy was held to outweigh the competing policy in favor of apprehension of criminals even though it is clear in a given case that the defendant has committed

(Continued on next page)

The facts in this case, accepting the jury determination on disputed issues necessary to its verdict, fully measure up to the test of entrapment first stated in *Sorrels* and reaffirmed in *Sherman*, that the "criminal conduct was the product of the *creative* activity of law-enforcement officials." For here, indeed, the State officials *created* and carried out the ingenious and well-planned scheme by which petitioner, instead of importuning, cajoling and engaging in hyperbolic efforts to extricate his business from an economic squeeze, committed the crime of bribery.

This is not the case of a person who has been engaged in an unlawful business or illegal activity such as the sale of narcotics; petitioner was, and for many years, had been engaged in the optical business. Nor were the State police and other State officials dealing with a known criminal or a person with a criminal record; petitioner had never been arrested or convicted (App. 391a).[16]

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an offense with the required criminal intent. Thus, in *Saunders v. People*, 38 Mich. 218 (1878) the conviction of a lawyer for unlawfully removing public records was reversed on ground of entrapment, where evidence established that defendant had requested a bailiff to assist the unlawful removal, and bailiff thereafter advised police, who thereafter trapped defendant in flagrante, aided by information furnished by bailiff pretending to work with defendant. See also *People v. Pinkerton*, 79 Mich. 110 (1889), where conviction of a woman for keeping house of ill fame was reversed where evidence established that police agents visited the "house" and engaged in intercourse with prostitutes there and that testimony of the agent formed the basis for defendant's conviction. See also *People v. Smith*, 296 Mich. 176 (1941).

[16] Cf *Sherman v. U. S.*, *supra*, where two earlier narcotic convictions were held insufficient to prove a readiness to sell narcotics. Also *U. S. v. Mathues*, 22 F2d 979, where the Court noted the distinction between the investigation of lawful and an unlawful business with respect to the application of the defense of entrapment.

That the petitioner had approached the shadowy edges of the crime cannot justify the action of the law-enforcement officials in pushing him over the edge. The relationship in a democratic society between the citizen affected by state action and the officials charged with enforcement of the law must leave a wide margin for citizen approach, protect and self-help.

This point was touched on in a Note in 28 Columbia Law Review, where the author commented:

> "* * * An offer of a bribe to a public official will not be regarded as entrapment. The offense is so grave, the evidence so difficult to obtain, the temptation so constant and recurring that a government is justified in testing its officers by a normal offer. But a government agent may not entrap a private citizen by demanding that a bribe be given. An incorruptible enforcement staff is capable of dealing with the bribe-giver whenever he appears; there is no need to seek him out. Furthermore, an innocent man, fearful of official retaliation, might readily yield to such a request. The Court in *United States v. Mathues, supra*, therefore properly held that an officer's suggestion he would accept bribes constituted entrapment." (At pp. 1073-4.)

This important aspect of the citizen-state relationship was brought out clearly in *U. S. v. Klosterman*, 248 F. 2d 191 (CA 3, 1957) where defendant taxpayer Klosterman and defendant Deeney, an Internal Revenue Agent were indicted and convicted of conspiracy to bribe federal officials to discontinue investigation of certain of Klosterman's tax returns. Upon learning from Deeney that an agent of Klosterman's had broached a bribe proposal to Deeney, King, Deeney's superior, urged Deeney, over a period of several months and against Deeney's recurrent

protests, to suggest to Klosterman, King's receptiveness to a bribe. Thereafter, upon Klosterman's offering King $5,000 apparently for the purpose of "working out" the Klosterman investigation, Klosterman and Deeney were arrested and convicted. The Third Circuit, sustaining the entrapment claim of both defendants in spite of a jury finding of no entrapment, reversed both convictions on the ground that the evidence as to both defendants established entrapment as a matter of law. But the Court reversed Klosterman's conviction with due process rhetoric, denominating it "shocking to justice * * *" because:

> "(Klosterman's) tax returns had been under investigation for an unusual length of time. During the period of investigation, Klosterman had numerous interviews with various agents and never once suggested an improper settlement of his tax liabilities. Thus far from evidence of a pre-disposition to commit this crime, this case presents affirmative evidence to the contrary. The lengthy investigation of Klosterman's returns without a decision to either prosecute criminally or to seek civil remedies must certainly have had the effect of causing him at least some measure of anxiety. This subtle *though, of course, unintentional conditioning of Klosterman would naturally have the effect of making him more susceptible to the persuasion of King through Deeney and Stafford.*" (At pg. 196.) (Emphasis added.)[17]

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[17] See also *U. S. v. Mathues, supra.* Two brothers were charged with bribing Prohibition Bureau agents investigating defendants' brewery. The evidence established that the first brother was directed by agents to obtain the second brother's approval of the first brother's offer to bribe agents. The agents did not conceal their identity and the second brother acquiesced in the bribe offer; the trial court, upholding the second brother's defense of entrapment as a matter of law, said:

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The development of the claim of entrapment as a due process defense in a criminal prosecution was presaged in the language of *Sorrells*—"unconscionable, contrary to public policy", "shocking to the sense of justice", "violation of the decencies of life". And in *Sherman* where the Court reiterated much of this language adding several "due process" phrases of its own to characterize the conduct—"means that violate rationally vindicated standards of justice," "certain police conduct * * * is not to be tolerated by an advanced society."

However, it was in *Raley v. Ohio*, 360 U. S. 423; 79 S. Ct. 1257, that this Court specifically held that State action, in convicting subpoenaed witnesses for contempt for refusing to answer questions which a State investigating committee had advised them they need not answer, constituted entrapment in violation of the due process clause of the Fourteenth Amendment.

The avowed plan of the State police and prosecuting official in inducing petitioner to come into Michigan for the purpose of having him offer a bribe to the optometric board, under the circumstances here disclosed, constituted entrapment; and the resulting conviction for a crime which

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> "There is, however, a broad distinction between cases of that sort and a case where a government agent whose duty it is to investigate and discover the commissions of offenses connected with an unlawful business in which a person is engaged, reveals himself as a representative of a bureau or department having charge of investigating and obtaining evidence concerning an unlawful business and offers himself as a participator in a different offense not connected with the business under investigation." (At p. 980.)

And see *Durham v. State*, 280 S. W. 2d 737 (Tex. Cr. App., 1955). The distinction recognized in *Mathes* was also approved in *28 Columbia Law Review*, 1067, 1073, 1074.

would not have been committed except for such entrapment, denied petitioner due process under the Fourteenth Amendment.

RELIEF SOUGHT

Certiorari should be granted.

Respectfully submitted,

GOODMAN, CROCKETT, EDEN, ROBB & PHILO,

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Attorneys for Petitioner,
3220 Cadillac Tower,
Detroit 26, Michigan.

Dated: Detroit, Michigan,
October —, 1960.

APPENDIX

OPINION OF THE MICHIGAN SUPREME COURT

People v. Ritholz
Decided June 6, 1960

SMITH, J. This appeal arises from a prosecution for corruptly offering money to influence the action of 3 public officers, members of the board of examiners in optometry.* It is not denied that money in fact changed hands. The defendant, however, asserts that the money was not offered with corrupt intent. He says that he paid it over to terminate a scheme of extortion. This the jury disbelieved. He was found guilty, a fine was thereupon imposed, and he was sentenced to imprisonment for a term of years.

The defendant was a partner in King Optical Company. This company had an office in Lansing adjacent to the office of Dr. E. L. Sanchick. It was the practice of King Optical Company to refer patients coming to it, in response to its newspaper advertisements, to any doctor in the city, "or to the doctor who leases space next door to us or adjacent to our office." The Michigan board of examiners in optometry (hereinafter called the board) had brought certain charges against Dr. Sanchick as a result of his relations with King Optical Company,† and it is with respect to defendant's alleged efforts to have the Sanchick case "washed out" by the board that much of the testimony is concerned.

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* CL 1948, §750.117 (Stat Ann §28.312).

† In *In re Sanchick*, 347 Mich 620, this Court reversed the order of suspension previously rendered against Dr. Sanchick for alleged unprofessional conduct.

The defendant had first met Dr. Feiler, according to the latter, in Chicago in 1949 or 1950. Since that time they had intermittent contacts. In October of 1951 they met in Chicago with respect to a patent matter. In the following month, November, Dr. Feiler was appointed to the board. The next meeting between defendant and Dr. Feiler was in 1952 or 1953. Dr. Feiler's version of this meeting is that it had to do with defendant's difficulties in his contact lens laboratory in Chicago, for advices concerning which he, Dr. Feiler, was paid the sum of $350. Defendant's version is that Dr. Feiler came to him, demanded money as the price of peace (with the Michigan board, of which he was now a member), and so received the said sum. Defendant made no report of this to the board, the Illinois police, the Michigan police, or any other law-enforcement agency.

Their next meeting occurred in 1953. Dr. Feiler testified that the meeting related to the sale of some contact lenses belonging to a Dr. Golden, that the sale did not eventuate, and that he was paid his travel expenses by Dr. Golden. Defendant's version was that this, also, was the occasion of further extortion, that Dr. Feiler had said, "You give me $500 or else I'll put you out of business," which sum was thereupon paid over. Again, there was no report by the defendant to the authorities of any jurisdiction of the demands allegedly being made upon him, now, apparently, as a matter of course.

In Chicago, in August or September of 1954, another meeting allegedly occurred. Although Dr. Feiler denies the meeting, defendant asserts that it was the occasion for another demand for money, specifically for $15,000, $5,000 for each of the 3 members of the board. This demand was allegedly overheard by a friend of the defendant, Dr. Brill, who testified to that effect. As before, no report of the demand was made to the police.

The Sanchick matter, concerning which the alleged bribe was paid, comes into the record in November of 1954. Dr. Feiler's testimony was that defendant called him, asked him about the Sanchick case and said "he would like to have this washed out." Defendant's version, again, is at variance. It was Dr. Feiler who called him, he says, and again it was a demand for money, this time for $15,000. Defendant resisted. He replied, he says, that he "wasn't going to be shaken down any more."

In January of 1955, Dr. Feiler testified, defendant again called him regarding the Sanchick case, stating, it was said, that it would be worth $3,000 or $4,000 to have it "washed out." Dr. Feiler testified that he responded that he could do nothing about it but defendant asked that they meet to discuss the matter. Dr. Feiler at this point notified the Federal bureau of investigation of the matter, who, in turn, we gather, notified the State police. When defendant and Dr. Feiler then met, on January 12, 1955, in the Sheraton-Cadillac hotel, the police had installed a microphone, and the conversation was monitored by them. Upon cross-examination the defendant admitted that he had at that time asked Dr. Feiler if he could do anything for Dr. Sanchick. When Dr. Feiler responded, at a later point, "I don't understand just quite what it is you want me to do," the defendant replied, "I want you to do just like anything else. You know what to do. Find a way to wash it out. Instead of the lawyers getting the money I give it to you. It's just as simple as that." The defendant further stated, in the course of their conversation, that if the board was going to push him (defendant) around that he was going to start a little pushing himself, as he had done in Indiana. There, he said, he had "filed a suit in Federal court for a million and a half, suing each member of the board and each member of the association and all of their officers

of the association personally, not as an association." He went on, describing his actions, "I wasn't very nice in Indiana. I was a bastard. I had the secretary of the board on the witness stand. I only started with him: I was going to keep him on for 3 weeks, day in and day out." He questioned Dr. Feiler thus: "If I start a number of suits like I did in Indiana, do they [the board members] scare pretty good?"

The next meeting of the defendant with Dr. Feiler in Detroit was late in March. On the 27th day of this month Dr. Feiler reported to the board members that defendant wished another meeting with him to discuss further the Sanchick case. This meeting was held at the Statler Hotel, the respective versions again opposing bribery (Feiler) against extortion (defendant). Although arrangements had been made to meet the next day, at the board meeting the following morning Dr. Feiler was advised by an officer of the State police, and the board, to have no further contact with the defendant. Nevertheless he did meet with defendant at a clothing store in Detroit, at which time and place the defendant put in his pocket an envelope later found to contain the sum of $500. This incident Dr. Feiler did not report to any proper authority until the following September when he turned the money over to the State police and informed an assistant attorney general of the matter. For his derelictions in connection therewith he was later removed from office by the governor.

Various telephone conversations having been had between Dr. Feiler and defendant, and reported by Dr. Feiler to State police officers, he was asked to attend a meeting in Lansing to discuss the matter with an assistant attorney general. Dr. Feiler stated in part that he had been requested by defendant "to get in touch with him" and he was authorized to call defendant in Chicago. This call

was monitored by the State police. Dr. Feiler asked if he (defendant) "was going to bring the stuff with him," to which defendant replied, "I'm not paying for anything in advance, not until the goods are delivered." Defendant said he was going to be in Detroit that week end and would contact Dr. Feiler later.

On Sunday, August 7th, defendant prepared to meet with Dr. Feiler in the Statler hotel in Detroit. He had hired Pinkerton detectives and was prepared to record the transaction. Dr. Feiler, however, acting under instructions, did not appear but, rather, telephoned excuses and set up a meeting at the Olds hotel in Lansing for the following night. To Dr. Feiler's inquiry as to whether defendant was prepared "to take care of this thing" the next night, defendant responded that he was not going to Lansing for a joy ride. Defendant thereupon instructed the Pinkerton detectives to meet him the next night at the Olds hotel in Lansing and to use a suite he had reserved.

We now come, at long last, to the happenings at the Olds hotel on the night of August 8th, the date and place of the alleged offense of bribery. Dr. Feiler, the other members of the board, and defendant were in one room. In an adjoining room were the Pinkerton detectives hired by defendant, with their tape recording equipment. In a room nearby were the State police officers. Defendant took charge of the meeting. He said that they were meeting "to see if we can work something out so we will have a little bit of a truce." He made reference to the Sanchick case, and to the antitrust suit he had filed. He spoke of his lawyers in the latter matter and how they were "cleaning up on both of us." We continue with the record. The defendant is testifying on cross-examination:

"*Q.* And did you then say, 'I am going to spend money on lawyers. There is no question about it. I would rather spend it some other way. Do you want me to discuss it with you gentlemen? Or with Julian'?

"*A.* Yes, sir.

"*Q.* And did Dr. Feiler say, 'They are here, and they understand the deal. I want to get out of here. I am not going to stay all night'?

"*A.* Yes, sir.

"*Q.* And did you say, 'All right. We can finish in 5 minutes. I am prepared to pay you $5,000'?

"*A.* Yes, sir.

"*Q.* And did Dr. Grigware say, 'Apiece?'

"*A.* Pardon?

"*Q.* Did Dr. Grigware say, 'Apiece?'

"*A.* Yes, sir.

"*Q.* Asking a question, and did you say, 'No. 5,000 is the money I've got alloted to spend. Rather than spending it on lawyers, I would rather give it to you'?

"*A.* Yes, sir.

"*Q.* And did Dr. Grigware say, 'What do you want in return now?'

"*A.* 'Yes, sir.

"*Q.* And did you say, 'I don't care who gets it or how it is divided. You know what I mean. In return? I want you to wash out this case. Get this Sanchick case washed out.'

"*A.* Yes, sir.

"*Q.* And did Dr. Howe then say, 'Then what do we get in return?'

"*A.* Yes, sir.

"*Q.* And did you say, 'What?' and did Dr. Howe say, and repeat, 'What might we get in return?'

"*A.* Yes, sir.

"*Q.* And did you say then, 'Well, the Federal case will be washed out too'?

"*A.* Yes, sir."

Additional discussion ensued. Mr. Ritholz said that he would give them "2,000 apiece, make it an even 6," but that he didn't have the entire sum with him. We continue with the testimony of the defendant on cross-examination:

"*Q.* And did Dr. Grigware say, 'No, I should say you don't want to wire it to me' and did you say, 'No, no, to myself. I will have somebody on the plane. I tell you what. One of my cousins, I don't know if you know him, has to go to Windsor anyway, so he can fly up here. We are moving our office to Windsor. So he was going there Wednesday morning. Let him go tomorrow. He will bring the dough. Now, where do you want me to give you the rest of the dough? Here's 300 bucks just to show good faith is all, bind the bargain'?

"*A.* Yes, sir.

"*Q.* And at that point did you hand the money?

"*A.* Yes, sir.

"*Q.* And whom did you hand it to?

"*A.* Dr. Feiler.

"*Q.* And what did Dr. Feiler do with it?

"*A.* He gave $100 each to the other 2 men.

"*Q.* And what did Dr. Howe do with his $100 bill that he had in his hand?

"*A.* I think he put it on the couch.

"*Q.* Back toward you?

"*A.* I don't exactly remember where he put it. You see, I was sitting on a couch, he was sitting on a chair, facing that way (indicating).

"*Q.* Well, what did you do with it?

"*A.* Give it back to him.

"*Q.* And did you say something when you gave it back to him?

"*A.* I don't recall.

"*Q.* Did you say that you wanted him to have it or some words to that effect?

"*A.* Yes, sir. Yes, sir."

At the close of the meeting the board members turned over to the State police the $100 bills they had received. The officers thereupon went to the Ritholz suite, introduced themselves, were admitted, and arrested defendant upon a charge of bribery. Detective Sergeant Chrispell of the State police testified that at this juncture defendant "went to another door in the room and pounded on the door, and at that time the door opened and there were 3 men standing there."

The defendant was thereupon taken to the State police headquarters and ultimately brought to trial as hereinabove noted.

It is first asserted to us that, "In view of *In re Sanchick*, 347 Mich 620, defendant could not lawfully be adjudged guilty of the criminal offense of bribery defined in section 117 of the penal code." In the case cited the Michigan board of examiners in optometry heard a complaint that Dr. Sanchick had employed King Optical Company as a "capper" or "steerer," in violation of the statute regulating the practice of optometry. The board found that Dr. Sanchick had violated the statute, and suspended his license. On appeal, the circuit court affirmed. Appeal was taken to this Court, appellant urging that th re was no evidence to support the finding of the board that he (Dr. Sanchick) employed the King Optical Company as a "capper" or "steerer" as barred by the legislation enacted.

Our holding was that the record did not support the allegation made and we reversed the order of suspension.

The above having been our disposition of the *Sanchick' Case*, appellant argues to us that defendant could not lawfuly be found guilty of paying money to board members "to induce the board to do the very thing which this Court itself enjoined upon them to do," *i.e.*, dismiss such complaint. Related to this issue is that involving the composition of the board. Defendant sought to show that the members of the board were in economic competition with him, had a pecuniary interest in the matter submitted to them, and hence that the act of the legislature creating such board was unconstitutional under the asserted principle of *Milk Marketing Board* v. *Johnson*, 295 Mich 644. From this defendant concludes that "defendant could not as a matter of law be guilty of bribing a member of such an unconstitutionally created board." To this point defendant cites *State* v. *Butler*, 178 Mo 272 (77 SW 560), a case arising out of the St. Louis municipal scandals around the turn of the century. It was there held that since the ordinance purporting to grant the board of health authority to award a contract for the removal of garbage was illegal and void, money offered a member of the board to influence his judgment in the matter did not constitute a bribe.

The above holding, it is clear, is not the law of this jurisdiction. As we said in *People* v. *McGarry*, 136 Mich 316, 322: "The validity of the act proposed is not the test," nor is the legal sufficiency of the action taken by the board. Here the defendant did insist upon and attempt to obtain the dismissal of the proceedings against Dr. Sanchick, the precise evil attempted to be guarded against in the bribery statutes, namely, the corruption of public of-

ficials, the attempt to pervert the exercise of honest judgment in the discharge of their duties. The gist is the attempt to so pervert and corrupt the effort to influence the official judgment by money or reward. It would be a monstrous and shameful doctrine that judgment in the courts or boards of this State might be purchased with insolence and impunity if the law under consideration were later declared unconstitutional, or, indeed, if some flaw were found to exist in the authorization or composition of the court or board before which a matter is heard. *Commonwealth v. O'Brien*, 107 Pa Super 569 (164 A 360). We do not, of course, in so holding, imply any illegality in fact in the board's composition, nor do we concede defendant's assertion that our holding in the *Sanchick Case*, *supra*, meant, as appellant asserts, that "the board had no jurisdiction to entertain" the matter.

It is urged, also, that the police "illegally searched defendant's rooms after his arrest and illegally seized his property consisting of a tape recorder and tape, therefrom." The trial court's denial of defendant's motion to suppress such evidence is alleged to be error. It is argued that the property seized was merely evidentiary material, not an instrumentality of crime or contraband.

It is to be noted that the arrest of defendant Ritholz was made only after the police had received direct evidence from the bribe recipients of the attempt made, and, in fact, were in possession of the three $100 bills paid by defendant. The arrest was thus made pursuant to statute (CL 1948, §764.15 [Stat Ann 1954 Rev §28.874]) authorizing an arrest without warrant when a felony has been committed and the officer has reasonable cause to believe that the person arrested has been guilty of the commission thereof.

Such being the case it is clear, as we held in *People* v. *Harris*, 300 Mich 463, 465, quoting *People* v. *Cona*, 180 Mich. 641, 652, that:

"'The police have the power and it is also their duty to search the person of one lawfully arrested, and also the room or place in which he is arrested, and also any other place to which they can get lawful access, for articles that may be used in evidence to prove the charge on which he is arrested.'"

This holding is correctly applied to the circumstances before us. An arrest, in fact, may well be an idle ceremony if the police seizure of evidence of the commission of the crime itself (particularly, as here, an electro-mechanical reproduction thereof) is held to be "unreasonable." The test of reasonableness, as was held in *Harris* v. *United States*, 331 US 145, 150 (67 S Ct 1098, 1101, 91 L ed 1399, 1405) "cannot be stated in rigid and absolute terms. 'Each case is to be decided on its own facts and circumstances.'" Moreover, we do not overlook the evidence that the tape machine here involved was voluntarily surrendered by the Pinkerton men, and that they made no complaint with respect thereto. *Cf. Holt* v. *United States* (CCA 6), 42 F2d 103. If they are regarded merely as agents of defendant, and their possession his, their voluntary surrender thereof was also his, as well as their surrender of the suite, which had been rented at his order. It is our conclusion that neither the receipt of the tape by the officers, nor the reference thereto made by the prosecution in cross-examining the defendant were violative of his constitutional rights.

Much of the additional error urged upon us involves the assertion that the payment of money to the public officers, above described, was not made with "corrupt intent" but rather with "the innocent purpose of terminating a long

series of extortions practiced upon" the defendant. It is asserted, moreover, that "bribery and extortion are mutually exclusive crimes," which the court refused to recognize, thereby committing error not only in the receipt of evidence but in the charge given. We will first examine such alleged errors.

In a case such as we are discussing, the crimes of bribery and extortion are alike in that each involves the payment of money to a public official. There, however, the similarity ends. Extortion is the exaction of money, under color of official rights, from an unwilling payor.* In bribery, on the other hand, the payor voluntarily presses his money upon the public official hoping thereby to influence his official action. Thus, as the Oklahoma criminal court of appeals pointed out in *Finley* v. *State*, 84 Okla Crim 309, 320 (181 P2d 849, 856): "While bribery and extortion are distinct offenses, the same facts may be the basis for the charge of either extortion or bribery." It depends upon the intent with which the money is paid. In *People* v. *Feld*, 262 App Div 909 (28 NYS2d 796), the appellant was indicted on the charge of extorting money from an employer by threatening to foment a strike among its employees. The defense was that the employer, instead of being a victim of extortion, had bribed the defendant (a representative of the labor union). The court speaks with entire accuracy when it states:

"A question of fact was presented and the appellant was entitled to have the jury instructed that if the employer were guilty of bribery, the appellant could not be guilty of extortion. The 2 crimes are mutually exclusive."

The word to be stressed in the above is the word "guilty." The mere fact of payment alone may be ambiguous, sus-

* See CL 1948, §750.214 (Stat Ann §28.411).

ceptible of interpretation either as bribery or as extortion. It is for the jury to determine which of the offenses, if either, has been committed, of which one there is evidence of "guilt." Only in that sense are the 2 crimes exclusive.

The court below, on the matter of intent, charged in part as follows:

"Now, it is the general claim of the defendant that he did agree to pay $6,000, that is $2,000 each to Drs. Feiler, Howe, and Grigware, on August 8, 1955; that he paid each of these men $100 to apply on that figure; but that his said agreement and the payment on account was made without any corrupt intent to influence the board in the case of Dr. Edwin L. Sanchick, and that the agreement was made by the defendant solely to get the evidence against these public officials for use in exposing them, and that Dr. Feiler had been extorting money from the defendant and that he had led the defendant to believe that Drs. Howe and Grigware were interested in doing the same."

And, also:

"Whether or not Dr. Feiler had extorted money or was attempting to extort money from the defendant is not the question that you are to decide by your verdict, but you, of course, may use your decision on that question in determining the defendant's intent in the bribery charge."

Although isolated sentences of colloquy or charge may support appellant's allegations of error in this respect, we are not persuaded that the charge as a whole was unfair to defendant or misstated the law. *See People v. Coleman*, 350 Mich. 268, 282.

Complaint is made, also, relating to the introduction of evidence. It was the claim of the defendant that in paying money to the public officials in the Olds hotel, he did so

"for the innocent purpose of ending their continued practice upon him of extortion." He insists that he had no "corrupt" intent and that none was shown. He paid, he says, innocently, to obtain evidence of extortion for submission to the proper authorities in order that he might no longer be made the victim of the defendant's evil machinations. It was a necessary step in his proofs, he asserts, that the series of extortions down through the years be shown, and in this showing he says that he was hampered and restricted by the court's rulings.

Corrupt intent is, of course, a necessary element in the crime of bribery. It is not necessary, however, as we pointed out in *People v. Vinokurow*, 322 Mich. 26, 30, 31, "that there be direct testimony as to the intent required in the statute. If such were the case it would be almost a rarity when a conviction could be obtained under this kind of a statute." The intent is to be gathered from the acts done and the circumstances under which they were done. Here the crime is alleged to have been committed in the Olds hotel. The testimony of what was said and done there is utterly barren of any intimation of previous extortions. The defendant was an experienced businessman, trained in the law, and well versed in the uses of the law, as his various anti-trusts suits amply demonstrate. That this man, recording the transaction by his own paid agents, would have made no reference in his lengthy discussion, with the board members, of the past extortions of at least one of their number, evidence of which he claimed to be gathering, is inherently incredible. That his reluctance to do so stemmed from any moral or legal scruples over making such criminality a matter of record is, itself, equally incredible. He was blunt and to the point respecting his payments. "In return for the money I want you to wash out this case."

Get this Sanchick case washed out." He would also dismiss the antitrust suit which he had instituted against the board members and the Michigan Optometric Association.

Upon such record the court might well have held completely irrelevant to the charge at hand any testimony whatever of past alleged extortions. There was nothing ambiguous about what was to be done, or what was sought in return. Nevertheless the court did permit the introduction of evidence hereinabove set forth, going back to the first meeting between Dr. Feiler and defendant in 1949 or 1950, the meeting in October of 1951, the next meeting, following Dr. Feiler's appointment to the board in November of 1951, subsequent meetings in 1953, and a meeting in August or September of 1954 in Chicago. With respect to these meetings, as we have seen, 2 different versions were presented to the jury: that of Dr. Feiler to the effect that they were of a legitimate business nature, that of the defendant that they were extortionate in character.

We will assume, without conceding, that the Olds hotel incident was sufficiently ambiguous as to require, in fairness to the defendant, the showing of a system of extortionate demands by Dr. Feiler and the board. This may be accomplished through evidence of past acts material to the charge of systematic extortion. The Arkansas supreme court in *Butt v. State*, 81 Ark. 172, 181, 182 (98 SW 723, 726, 118 Am. St. Rep. 42), in holding that evidence of prior acts of bribery was admissible, stated the applicable principle in these words:

"You might as well expect that one should be able to judge correctly the merits of a play, and of the motives and conduct of the actors as displayed therein, by witnessing only the last scene of the last act, as to expect, where the crime under investigation is part of a connected scheme,

that the jury should be able to determine the motives of the defendant and judge correctly of his guilt or innocence without any knowledge of the origin of the crime or the circumstances and motives that led up to it. The law does not blindfold courts and juries in that way, and it is always competent to show the beginning as well as the end of the criminal transaction."

This, it will be noted, does not require the aid of the intent statute,* the purpose of which, as we held in *People v. Rose*, 268 Mich. 529, 526, "was to do away with the rule as to proof of other offenses and permit the introduction of such testimony even though it might show or tend to show the commission of another prior or subsequent offense by defendant." It is just at this point that defendant makes his thrust at the introduction of evidence relating to the system of extortions. He says it was received with restrictions as to its use, grudgingly, sometime with disparaging comment as to its materiality, and at times only as bearing upon the credibility of Dr. Feiler. The short answer to all of this is that it was, nevertheless, received, and in such detail that, in our opinion, the jury was given a reasonably accurate presentation of the claims of both the State and the defendant. Even with respect to evidence of system, the relevance of events far removed in time or circumstance must lie within the discretion of the court and we are not persuaded that prejudice arose either from ex-

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* CL 1948, §768.27 (Stat Ann 1954 Rev §28.1050), reads:

"In any criminal case where the defendant's motive, intent, the absence of mistake or accident on his part, or the defendant's scheme, plan or system in doing an act, is material, any like acts or other acts of the defendant which may tend to show his motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing the act, in question, may be proved, whether they are contemporaneous with or prior or subsequent thereto; notwithstanding that such proof may show or tend to show the commission of another prior or subsequent crime by the defendant."

clusion or reluctant admission. Assuming, as we do, that evidence of a system of extortion was admissible, error would lie in receiving it as bearing solely upon credibility, and not as substantive proof, but we think the court adequately covered the matter in its charge to the jury in which it said:

"Now, it is the general claim of the defendant that he did agree to pay $6,000, that is, $2,000 each to Drs. Feiler, Howe, and Grigware, on August 8, 1955; that he paid each of these men $100 to apply on that figure; but that his said agreement and the payment on account was made without any corrupt intent to influence the board in the case of Dr. Edwin L. Sanchick, and that the agreement was made by the defendant solely to get the evidence against these public officials for use in exposing them, and that Dr. Feiler had been extorting money from the defendant and that he had led the defendant to believe that Drs. Howe and Grigware were interested in doing the same.

"As stated, these general claims as far as the defendant is concerned and the court's statement of them, is not to be taken by the jury to limit the consideration of other claims which have been offered and received in evidence during the trial.

"As I have stated to you before, the gravamen of the offense in this particular case, in view of the admissions of the defendant regarding the agreement and the payment, is the corrupt intent to influence that board in the Dr. Sanchick case, if there was any corrupt intent. You must determine that question to reach your verdict.

"There has been evidence offered and received on the question of whether or not Dr. Feiler was extorting money or trying to extort money from the defendant by threatening his business. This evidence has been admitted for your

use in determining the defendant's intent at the time of the agreement and the payment of August 8, 1955. That is the only purpose of such evidence. Whether or not Dr. Feiler had extorted money or was attempting to extort money from the defendant is not the question that you are to decide by your verdict, but you, of course, may use your decision on that question in determining the defendant's intent in the bribery charge. * * *

"The court also wishes to state that during the course of the trial on at least 1 occasion, and maybe on more, the court ruled that certain testimony regarding the affairs between the defendant and Dr. Feiler was only admissible as bearing upon the credibility of Dr. Feiler, and that I wish to change. That testimony may be also used by you, if you deem it useful, for the purpose of determining the question of extortion in this case."

We have examined the remainder of the alleged errors made, including those relating to evidentiary matters, the charge, and to the prosecutor's cross-examination of the defendant, as well as his final argument, and find they are without merit. Some of the phraseology of the charge might have been more artistic, and the prosecutor might at times have been more gracious, but no trial ever conducted is wholly without blemish. Technical error, however, is not our test. We must be persuaded that the errors complained of were so gross as to have deprived defendant of a fair trial, that his conviction was, in truth, a miscarriage of justice. We are far from so persuaded. Appellant argues that the evidence does not sustain the verdict of defendant's guilt beyond a reasonable doubt. The evidence thereof, on the contrary, may be regarded as overwhelming. Defendant's account of the extortions prac-

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* See CL 1948, §769.26 (Stat Ann 1954 Rev §28.1096).

ticed on him over a period of years, suffered by him in silence, verge on the incredible. He argues that he did not complain to the police of them because his word alone would not have been effective. A citizen's failure to report crime is not excusable by reason of such assumption on his part. We note, also, that at no telephone conversation (between Dr. Feiler and defendant) monitored by the State police do we find complaints of past extortions by defendant, though he testifies he made them in abundance at conversations unheard by others. Thus the conversation held on January 12, 1955, in the Sheraton-Cadillac hotel in Detroit, heard in its entirety by the police (and the first monitored conversation) has a significance beyond that of its actual content. Up to this point defendant's versions of the meetings held with Dr. Feiler have been replete with his (defendant's) protests against the "shakedowns" to which he was allegedly being subjected. Yet, although we have examined the police versions of this conversation with care, the testimony of the officers, Van Wie, Bogan, and Chrispell, we find it to be utterly barren of reference to past extortions, shakedowns, or other coercion practiced upon defendant by Dr. Feiler. Rather, it is defendant who is aggressively demanding that Dr. Feiler have the Sanchick case "washed out," not only for a money reward, but, if not, under peril of receiving the same kind of legal harassment as defendant had, in his own words, exercised against officials of the State of Indiana. The picture, in short, is not that of a public officer exercising the powers of his office for purposes of intimidation and coercion, but rather that of a citizen demanding that official action cease, both for reward and under threat.

The Olds hotel incident was, as we have noted, likewise barren of such accusations on the part of the defendant, though his bargaining was frank enough to include other

considerations, including the dismissal of the Federal case by defendant. Finally, regardless of the merits or demerits of Dr. Feiler, we do not overlook the fact that money was offered to the other members of the board, whose connection with any extortion was far more tenuous than that of Dr. Feiler, if indeed, it can fairly be said to have existed at all. The case was carefully tried by competent counsel. The evidence adduced against defendant was ample to justify the verdict reached. We find no substantial error in the case and no need to discuss additional claims of error.

Affirmed.

DETHMERS, C. J., and KELLY, BLACK, and EDWARDS, JJ., concurred.

CARR, and KAVANAGH, JJ., did not sit.

SOURIS, J., took no part in the decision of this case.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1960

No. 468

BENJAMIN D. RITHOLZ,

Petitioner

vs.

THE PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

Petition for Writ of Certiorari To the Supreme Court of the State of Michigan

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SPEAKER-HINES AND THOMAS, INC., LANSING, MICH. — 1960

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OPINION BELOW

STATUTES INVOLVED

joining room when he conversed with Dr. Feiler on January 12. The petitioner telephoned Dr. Feiler and told him of this information (191a).

Prior to March 27th there was a telephone conversation between Dr. Feiler and the defendant and they arranged a meeting in Detroit for March 27th and 28th. Dr. Feiler testified that petitioner telephoned him stating he would be in Detroit on those dates and requested him to meet him there (192a). The petitioner testified that Dr. Feiler called him (192a). On cross-examination, when the defendant's telephone number was brought out, petitioner admitted telephoning Dr. Feiler and talking to him for 21 minutes on March 22nd (540a); on March 24th for 5 minutes; for 5 minutes on March 25th (541a); and for 8 minutes on March 26th (541a). The petitioner sought to explain these calls to Dr. Feiler saying they had an arrangement which had existed for several years that when Dr. Feiler called him collect, he would refuse to accept the call and later call Dr. Feiler back (541a).

On March 27th the petitioner telephoned Dr. Feiler at his hotel room in the Sheraton-Cadillac hotel and expressed a desire to meet with him to discuss the Sanchick case (192a). Dr. Feiler informed the members of the board of the call and went to the petitioner's room at the Statler Hotel (192a-193a-194a). There Ritholz asked him to see what he could do about getting the Sanchick case washed out and said that it would be worth one thousand dollars (194a-195a). Dr. Feiler replied he didn't think he could help and Ritholz said he wanted to meet Dr. Feiler the following day for a further discussion. Feiler agreed to meet him and left (195a). He reported this to the Optometry Board in the morning of March 28th and was advised by the board and Detective Sergeant Chrispell to have no further contact with the defendant (195a). Later on

March 28th, he received a call from the petitioner who expressed the desire to meet him and further discuss the Sanchick case. Feiler told the petitioner he could not do anything for him and that he was going shopping (196a). Petitioner asked him where and Feiler gave him the name of the store (196a). Subsequently Feiler went shopping at Harry Suffrin's store in Detroit. The petitioner entered and motioned him to follow (197a). He did so. Petitioner entered a men's room, looked to see if anyone else was present, took an envelope, placed it in Feiler's coat pocket and said "see what you can do. Wait a few minutes after I leave and then you can go" and left. Feiler waited a moment, left the store and returned to his hotel room and there found $500 in currency in the envelope (197a-480a). He returned to Flint (197a), kept the money until September 20, 1955, when he reported this event to an Assistant Attorney General and turned the money over to the State Police (200a). The $500 was admitted in evidence on the trial, without objection (201a-202a). As a result of his receiving this $500 and failing to report it to the Optometry Board or law enforcement officials until September, 1955, he was removed from office by the Governor (306a-307a).

Ritholz testified that Dr. Feiler came to his room on this occasion, March 27th, (476a), told he was being watched and would talk fast (476a); that Dr. Feiler told him he had one board member in his pocket and needed one more and thought he had him sewed up; that he told him that board member was in town and he wanted to take him out and show him a good time and that would provide three board members to clean up the situation and keep him in good shape; that Dr. Feiler then asked him for $500 to entertain the third member; that he agreed to give Dr. Feiler the $500, but did not have it on his person and promised to deliver it the following day (477a). He further testified that Dr. Feiler talked to him the following after-

noon and told him he was going shopping, gave him the name and location of the store and requested him to meet him there (477a); that he went to the store, saw Dr. Feiler on the first floor (478a); that Dr. Feiler motioned him toward the lavatory and that he followed Dr. Feiler there, that there was no one else present (478a). He further testified that Dr. Feiler pulled out his overcoat pocket and that he placed an envelope containing $500 in Dr. Feiler's pocket (480); that Dr. Feiler left immediately (272a-274a) and that no words were spoken by either party on this occasion (480a).

The petitioner testified that he did not recall hearing from Dr. Feiler again until June (481a-482a), however, on cross-examination when the telephone numbers were supplied, the defendant recalled telephoning Dr. Feiler on March 30, April 22, and May 17th.

In April 1955, the petitioner instituted suit in the Federal Court for the Eastern District of Michigan against all of the members of the Michigan Board of Examiners in Optometry, individually, and many other optometrists, alleging a violation of the Clayton Anti Trust Law and claiming damages and costs in the sum of $1,000,000.00 (481a-531a-536a).

Both Dr. Feiler and the petitioner testified to a telephone call on about June 17, 1955, wherein Ritholz made inquiry regarding the status of the Sanchick case; that Dr. Feiler told the defendant there was nothing he could do, or words to that effect. (204a-205a-206a-543a).

Dr. Grigware, a People's witness, testified that June 14, 1955 petitioner telephoned and told him Dr. Sanchick was unhappy with the proceedings of the Optometry Board and asked him to see what he could do to have those

charges dropped. He offered to refer several hundred patients a year to Dr. Grigware from his Grand Rapids office (314a); that Ritholz further said that he had enough power in the Senate to prevent future appointments to the Optometry Board of anyone recommended by the Michigan Optometric Association or Governor Williams. (page 7b)

Dr. Feiler testified that on July 20th petitioner telephoned him and asked him if there was anything he could do to wash out the Sanchick case and that when he replied in the negative, petitioner said he was going to start taking depositions in the Federal Court case against the board members the following week (206a-207a). He further testified that he received telephone calls from the petitioner Ritholz every day for several days in succession wherein Ritholz said he wanted the Sanchick case washed out, mentioned the Federal Court case, and said that the attorneys would become wealthy as a result of the squabble between himself and the Optometry Board, and that he reported the substance of these telephone calls to police officers (207a-208a).

On August 3, 1955, Dr. Feiler, at the request of an Assistant Attorney General, went to the Olds Hotel in Lansing, met with Dr. Howe, secretary of the Optometry Board, Detective Lt. Donald Berry of the Michigan State Police, Inspector Karl Braun, Optometry Board investigator, and Irving B. Beattie, an Assistant Attorney General; that he reviewed his recent conversations with the defendant Ritholz, and stated that Ritholz expressed a desire to come to Michigan to offer a bribe and had requested him to call him back (208a). At the suggestion of Mr. Beattie, Dr. Feiler telephoned the defendant in Chicago. This call was monitored by Detective Lt. Berry on an extension telephone (211a). Dr. Feiler and Lt. Berry testified that Dr. Feiler told Ritholz he was getting things lined up (210a-420a)

and asked him when they could meet; that the petitioner requested a meeting at Detroit on Sunday, August 7th, at the Statler hotel (420a). Dr. Feiler asked the petitioner if he was bringing the stuff with him and petitioner replied he was not paying until the goods were delivered (420a); that the petitioner said "I have a big stick in one hand and kid gloves in the other and I would rather handle this with kid gloves;" (420a). He warned Feiler to be careful what he said on the telephone "because they have these damned rooms 'bugged;" (420a); that Dr. Feiler asked Ritholz if he wanted three members of the Board to meet with him and that petitioner replied "don't be a damn fool. This is between you and I. If there is anybody else in the deal they'll be taken care of" (420a). Petitioner suggested the use of a middleman and suggested first one of his own attorneys in Detroit (421a) and then gave the names of three State Senators (211a). He stated that he wanted to meet Feiler in Detroit on August 7th (211a). No sum of money was mentioned in this conversation (421a). Ritholz did most of the talking. The petitioner agreed that this testimony was correct (484a).

On August 4, 1955, Ritholz telephoned Dr. Feiler (212a) and voiced his suspicions because Dr. Feiler had not mentioned the Federal Court case in the conversation of August 3rd, and inquired as to whether or not he wanted that case dropped (212a).

On August 5th, Lt. Berry testified that Dr. Feiler reported this conversation to him (421a).

On August 5, 1955, petitioner telephoned Dr. Feiler and confirmed the time and place of meeting on August 7th. He requested Dr. Feiler to bring the other two board members with him (213a).

The substance of this conversation was reported to Lt. Berry by Dr. Feiler (421a).

Blackwell, a Pinkerton agent, testified that on August 4th petitioner had one of his attorneys contact Burns and Pinkerton detective agencies (512a-367a), that on August 5th, the petitioner engaged the services of Pinkerton Investigators (268a); that petitioner represented to this agency that a Dr. Julian might try to shake him down in a business deal (369a); that Dr. Julian was not a public official or a part of State government (370a,545a), and that he wanted a recording of an anticipated conversation for future reference for whatever purpose he desired to use it (547a-590a). Ritholz admitted he did not give the Pinkerton investigators any information of any previous alleged acts of extortion or any details (544a).

Petitioner was present at the Statler hotel on Sunday, August 7, with three Pinkerton Investigators who had set up a recording machine (346a). The anticipated visitor did not arrive and the petitioner telephoned Dr. Feiler's home and Dr. Feiler finally returned his call (347a). This telephone call was monitored by Lt. Berry (215a-422a); and the petitioner agreed that the substance of the conversation was correct (546a-547a). The petitioner asked Dr. Feiler why he had not come to Detroit and Dr. Feiler replied that he could not get the board members together (215a). The petitioner then suggested a meeting the following day at the Olds Hotel in Lansing (216a-546a). He said he had to make reservations and would call back in fifteen minutes (216a). Petitioner Ritholz called back and informed Dr. Feiler that he had his suite at the Olds and for him to bring the other board members and meet with him at 8:30 on August 8th (216a-422a). Dr. Feiler asked if this was final and if he had the stuff with him and the petitioner

warned Feiler that someone might be listening on the telephone (422a). Ritholz then directed the Pinkerton investigators to meet him at the Olds hotel on August 8th and to register under fictitious names (372a).

On cross-examination the petitioner admitted that he never reported any of these alleged acts of extortion to law enforcement officials of Illinois, Michigan, or any other place, and when he was questioned regarding that replied as follows:

"A. I reported nothing to the police. I intended to report to the police on August 9th.

Q. In other words, the day after you were caught?

A. Yes. I wasn't ready to present my case to the police."

THE BRIBERY TRANSACTION

On August 8, 1955, at the request of State Police, Drs. Howe, Grigware, and Feiler met with State Police detectives and an Assistant Attorney General, Irving Beattie, at the Kellogg Center in East Lansing in the early evening (289a-315a-217a-423a). At this time Dr. Feiler and others reviewed recent events. All persons present were informed of Ritholz's request for a meeting at the Olds Hotel at 8:30 p.m. (217a). The three doctors were given general instructions and were advised that if Ritholz requested them to wash out the Sanchick case, they could agree for the purpose of obtaining evidence, and were instructed to accept any money Ritholz offered and turn it over to police officers who would be stationed in a room adjoining the Ritholz suite (316a). Drs. Howe, Grigware, and Feiler went to the Olds Hotel and there met State Police detectives, were searched, their money counted. They then

proceeded to the Ritholz suite under observation of the police (291a 292a 424a).

The three doctors were admitted to the suite by Ritholz and a conversation ensued between the petitioner and the three members of the Optometry Board (424a). Ritholz did most of the talking and explained the purpose of the meeting, stating that it was called to see if there could be a truce (549a). He told the board members to forget that he was a lawyer as he did not practice law (541a-570a). He referred to the Federal court suit in which the board members had been joined as parties defendant and said that the lawyers would become wealthy and further stated,—"so here we are in the middle with these bastards—cleaning up on both of us," (551a). Ritholz brought up the name of Edwin L. Sanchick (551a) who rented space from him in the Tussing Building in Lansing, and to whom the King Optical Company referred persons who responded to their newspaper advertisements, and said he wanted the Sanchick case called off; that he wanted peace (552a). He assured the board members that they had nothing to worry about because if he made trouble for anyone he would make trouble for himself, get publicity and it would ruin his business (553a). He said he didn't want to try anything. He wanted to go home and take care of his business (554a). He then said he was going to spend money on lawyers and that he would rather spend it some other way and asked the board members whether they wanted him to discuss it with all of them or with Dr. Feiler (555a). Dr. Feiler suggested that it be discussed with all of them and Ritholz then said that he was prepared to pay them $5,000 (555a); that this was the sum he had allotted to spend and that he would rather give it to them than spend it on lawyers (556a). Dr. Grigware inquired what Ritholz wanted in return and Ritholz said he wanted the Sanchick case washed out (556a). Dr. Howe

then inquired what the board members would get in return and Ritholz said the Federal case would be washed out too. (556a). Ritholz then told the board members they would not be able to hold the hearing on the Sanchick case as scheduled on August 16th when there was a stay of proceedings (557a). Dr. Grigware said that Mr. Moule, an assistant attorney general, had never informed the board of such stay of proceedings (558a). Ritholz said they had better check with Mr. Moule, for $5000 and then said he would go another $1000 to make it even (558a-559a).

Ritholz then suggested that Sanchick's attorney file a motion to dismiss on the ground the complaint did not make out a cause of action (559a). He further said there would have to be a show of good faith (561a); said he would draw up a dismissal of his federal court case and deposit it with the attorneys and that he would call the attorneys and immediately call off the hearings in the Federal court case (563a). Ritholz made notes of things to be done (566a-569a) and Dr. Feiler sat next to him and copied his notes (566a). Ritholz suggested that the Sanchick case be washed out by the board on an informal hearing (221a) and assured the board members that no one would interfere with them, saying that pressure had been put on Lt. Governor Hart and Deputy Attorney General Gilmore but that he could pull the pressure off. He named senators whom he claimed put on this pressure and said "This is a nice clean way for everybody" (570a). He went on to say that he wanted to operate in Michigan and wanted to operate as legally as he could; that he had no horns, and that life was too short (570a-571a). And he continued by saying that he would fight if he had to fight; that he had lots of pep and said, "Jesus, I'll handle this case if it takes me six years and every State in the United States" (572a). He then said it would be better to avoid this as it would be like a war with

atomic bombs; that if he won he would lose (572a). And he again suggested that the board hold an informal hearing and wash out the Sanchick case (572a). He said he had Dr. Howe down for two days testimony on deposition in the Federal court case but that he wouldn't get through with him in two days, that it would take two weeks (575a). He then said he would deliver the money the following day (575a 577a); that he thought Dr. Feiler was kidding because he didn't show up in Detroit and he didn't think anyone would ever show up (576a). Ritholz then suggested various means of delivery of the money (578a). He said he had $500 with him (578a); that the board members could have that on account and that he would deliver the balance the following day (578a); that there would be no need for a hotel room as he could give it to them in a restaurant anywhere (578a). He assured them all he would take care of payment and again reiterated his proposal by saying that he would give them $5,000 if they would wash out the Sanchick case and find that they could not hold a hearing (579a); that they would be in contempt of court (579a); he then raised the amount to $2,000 each so it could be split even and then inquired "You fellows trying to pull something now?" (579a). Dr. Feiler replied "yes" (579a). He then handed three one hundred dollar bills to Dr. Feiler who in turn handed $100 each to Dr. Howe and Dr. Givigware (319a 319a 580a). Dr. Howe put the $100 handed to him on the couch (580a-581a). Ritholz picked it up and handed it back to Dr. Howe and told him he wanted him to have it (581a). Ritholz then suggested that the board cooperate with him and let him know if they thought that he had done anything wrong and that he would also cooperate (581a). He then suggested that he could send a certified check for the balance payable to a fictitious person and that it would be as good as cash and suggested as an alternative "I can meet you in a

restaurant; we go in a toilet, and I throw it in your pocket. That's all. Simple, isn't it?" He then asked Dr. Feiler if he could deliver the balance of the money to him and Dr. Feiler agreed. Ritholz then said he would call Dr. Feiler the next night and would tell him some restaurant and in two minutes he would be on his way home (582a-583a). He then asked the board members if they trusted him for dismissal of the Federal court case; was given assurance that they did. (584a-585a-586a). The notes detailing the transaction made by Ritholz and Dr. Feiler were completed and Dr. Feiler's notes were admitted in evidence on the trial (223a). The notes made by Ritholz were never found by police officers. Ritholz testified he left the notes in the hotel suites and later on cross-examination he testified he didn't know what had become of the notes (589a). Ritholz then said, "All right, are we set?" Dr. Howe said "Yes." Ritholz said, "All right, I got it all written down and you've got it all written down. Tomorrow night I will meet you in Flint and you can trust me." He then said "You don't think I am trying to screw anybody. I would only be screwing myself. I want peace that's all, and if anything comes up, Doctor, where you think something has gone wrong, tell me." (588a). Ritholz then explained how he used to fight with the Better Business Bureau, but that now they called him and he straightens it out (589a). Ritholz then said "That's all" (589a). Drs. Howe, Grigware, and Feiler, then bade him farewell and Ritholz said "Okeh, see you tomorrow. I am happy with this." (589a).

Drs. Howe, Grigware, and Feiler left the Ritholz suite and went immediately to the adjoining room occupied by State Police detectives and turned over the one hundred dollar bills they had received (320a). State Police Detective Lt. Sheridan and Sergeant Chrispell went to the Ritholz suite, identified themselves as police officers, were

admitted by Ritholz and placed him under arrest for violation of the bribery statutes (401a-403a). Having information that the suite had been registered in two names, the officers asked Ritholz if anyone was with him (401a). He told them he had his own policemen (401a). Ritholz then knocked on the connecting door of his suite, according to a prearranged signal, and some Pinkerton agents came out the door (402a). Ritholz was handcuffed to one of them but when the Pinkerton agents identified themselves, the handcuffs were removed (442a).

Mr. Higgins, the Pinkerton agent in charge of the detail, turned over the recorder and recordings to the police (402a-427a) and explained that the petitioner had told them that he expected a Dr. Julian to attempt to extort money from him and that he wanted their services to prevent the extortion and that they were retained to take a tape recording of a conversation and to turn it over to Ritholz for his "future reference." (345a-349a).

The defendant Ritholz was taken to the Michigan State Police Headquarters by Det. Lt. Berry. (427a)

On his arrival at State Police Headquarters the defendant was searched by police; then questioned by an assistant attorney general about fifteen minutes later (592a). The petitioner refused to answer whether he gave any money to any members of the Optometry Board that evening, stating he was an attorney, a member of the Chicago Bar and American Bar Associations; was without an attorney and that all questions might tend to incriminate him. (593a-594)

The defense made an opening statement detailing its theory that the petitioner did not intend to bribe on August 8, 1955, but only to comply with the last of a series of

extortion demands by Dr. Feiler for the purpose of obtaining evidence to turn over to authorities the following day, and outlining its claim of previous specific instances of extortion it expected to prove (445a).

Petitioner took the stand in his own defense, and on cross examination admitted the bribery of the state officials (505a to 591a). He also admitted he wanted to have the Sanchick case washed out (591a).

There is a great deal of testimony in the record regarding other previous relationships between petitioner and Dr. Feiler which we believe are well covered by the Supreme Court of Michigan in its opinion, which we believe are immaterial here.

QUESTION PRESENTED

Respondent claims that he was convicted in violation of the Due Process Clause of the Fourteenth Amendment. This claim he bases upon the assertion that he was induced to commit bribery by state officials.

We respond as follows:

1. Respondent, in the course of the trial, adopted two conflicting and inconsistent theories in his defense.

(a) On the one hand he claimed that he arranged the bribery transaction himself in order to entrap certain state officials who had been extorting money from him for years.

(b) On the other hand, he claimed that the bribery transaction was engineered by State officials in order to entrap him.

The Supreme Court of Michigan, we believe, in its opinion, rightly characterized petitioner's first claim as verging on the incredible. It stated:

> "We have examined the remainder of the alleged errors made, including those relating to evidentiary matters, the charge, and to the prosecutor's cross-examination of the defendant, as well as his final argument, and find they are without merit. * * * Defendant's account of the extortions practiced on him, over a period of years, suffered by him in silence, verges on the incredible. He argues that he did not complain to the police of them because his word alone would not have been effective. A citizen's failure to report crime is not excusable by reason of such assumption on his part. We note, also, that at no telephone conversation (between Dr. Feiler and defendant) monitored by the State police do we find complaints of past extortions by defendant, though he testifies he made them in abundance at conversations unheard by others. Thus the conversation held on January 12, 1955, in the Sheraton-Cadillac hotel in Detroit, heard in its entirety by the police (and the first monitored conversation) has a significance beyond that of its actual content. Up to this point defendant's versions of the meetings held with Dr. Feiler have been replete with his (defendant's) protests against the 'shakedowns' to which he was allegedly being subjected. Yet, although we have examined the police versions of this conversation with care, the testimony of the officers, Van Wie, Bogan, and Chrispell, we find it to be utterly barren of reference to past extortions, shakedowns, or other coercion practiced upon defendant by Dr. Feiler. (*Rather, it is defendant who is aggressively demonstrated that Dr. Feiler have the Sandlick case 'washed out,' not only for a money reward, but, if not, under peril*

of receiving the same kind of legal harassment as defendant had, in his own words, exercised against officials of the State of Indiana.) The picture, in short, is not that of a public officer exercising the powers of his office for purposes of intimidation and coercion, but rather that of a citizen demanding that official action cease, both for reward and under threat.

"The Olds hotel incident was, as we have noted, likewise barren of such accusations on the part of the defendant, though his bargaining was frank enough to include other considerations, including the dismissal of the Federal case by defendant. Finally, regardless of the merits or demerits of Dr. Feiler, we do not overlook the fact that money was offered to the other members of the board, whose connection with any extortion was far more tenuous than that of Dr. Feiler, if indeed, it can fairly be said to have existed at all. The case was carefully tried by competent counsel. The evidence adduced against defendant was ample to justify the verdict reached. We find no substantial error in the case and no need to discuss additional claims of error." (Emphasis supplied)

With reference to the second claim, defense counsel, as admitted by the petitioner, did not argue the matter of entrapment to the jury (petitioner's brief p 14).

Moreover, defendant counsel clearly showed his intent to abandon the defense of entrapment when he stated to the jury in his final argument: (669a-670a)

"Now, he [Ritholz] goes to the hotel suite with the intent to bribe, and this is the thing, and he doesn't have but $500 in his pocket to pay money, which, as

the testimony appeared, they wanted then and there, based on an understanding of $9,000.

"Now, when he was there, when he passed over the money, did he do it corruptly, to bribe these gentlemen, wilfully and corruptly to bribe them, so that they would be influenced in their decision pertaining to the Board? Or, rather, did he, with $500 and this set up we have described, isn't it more logical and more consistent, and doesn't it stand the test of reasonable doubt, that when he gave them that money and engaged in that talk, he did so as he said, to get evidence on Dr. Feiler particularly? Evidence of what? Evidence that he was being extorted.

"Now, Mr. Beattie, a representative of the Attorney General, was already in the camp on August 8th. I don't mean the camp, but he was advising Dr. Feiler. The State Police were on his side. Where could this layman (1390) from Chicago go without professional status, and how would he be received if he didn't have some proof positive; and to his mind, right or wrong, at the time, he believed the only way he could present this evidence to the proper authorities was to put it up in such a form that they couldn't turn it down, and with a recording and the testimony of three other men, these Pinkerton fellows, he had it, and he thought, and that is what he wanted, to nail it down, to deliver it to the authorities and let them do what they wanted, based upon the evidence he brought to them:

"*Now, that, in a sense, is the crux of this case.* It is intent. And it must be that he had a corrupt intent, to do only one thing, despite the circumstantial evidence to the contrary, that he had a corrupt intent

to influence these men to do something in reference to their Board." (Emphasis supplied)

Furthermore, in his brief to the Supreme Court of Michigan, petitioner did not raise the question of entrapment as a Federal issue. He claimed that the trial court had erred in his instruction by taking the issue of entrapment away from the jury. The following language from petitioner's brief in the lower court clearly manifests this:

> "that at the very minimum there was presented a factual question for the jury as to whether defendant was entrapped by the extortionate inducements of Dr. Feiler and by the activities of the other board members, police officers and the assistant attorney general, but the Court committed prejudicial and reversible error by instructing the jury that in his view there was no evidence of entrapment;" (p 114)

> "Since there was convincing evidence of extortion practiced by a member of the board upon defendant over a period of years, the prosecution's scheme of entrapment in which the board member participated by continuing his threats, removed the criminality of the act of mere payment of money to public officers, and reversible error was committed by the court when it instructed the jury there was no evidence of entrapment." (p 126)

With reference to the entrapment itself the petitioner sought, both before the jury and the Supreme Court, to make it appear that the certain language used by an Assistant Attorney General was proof that the state officials were attempting to involve Ritholz in a criminal transaction which was not initiated by him. In this statement the Assistant Attorney General advised Dr. Feiler not to be

"too careful of entrapment" when he reported to the Optometry Board the fact that he had been approached by Ritholz to "wash out" the Sanchick case.

However, the language used must be read in context. The statement was made by the Assistant Attorney General after he had been advised that Ritholz had approached Dr. Feiler with the intent of bribing him and the Board. This statement, reviewed in context, makes it clear the Assistant Attorney General was giving a legal opinion that in view of Ritholz's initiation of the proceedings, the State officials could go along with him without being guilty of entrapment. We invite the Court's attention to the following facts which indicate clearly that the bribery transaction originated with the petitioner and was actively promoted by him and that the state officials merely went along with him in his acts.

Dr. Grigware, one of the members of the Optometry Board, testified that Ritholz "called him and asked him to drop the Sanchick charges and that he would refer several hundred patients a year to him, and also threatened him" (314a).

It was Ritholz who suggested to Feiler to have the Sanchick case "washed out" and told him it would be worth a lot of money to do so. On January 12, 1955 petitioner called Dr. Feiler and asked him what he could do about "washing out" the case and told him it would be worth 3 or 4 thousand dollars. Dr. Feiler told him "he didn't think he would do anything about it." (181a) This conversation was repeated by Feiler to an FBI agent and to the Michigan State Police. (184a to 187a) Subsequently, at the request of the Michigan State Police and Detroit police detectives, Dr. Feiler occupied a room at the Sheraton-Cadillac Hotel on January 12, 1955, in which a micro-

phone had been installed by the police; an adjoining room was occupied by the Michigan State Police who were equipped with headphones to overhear the conversation in Dr. Feiler's room. (182a - 183a) The testimony showed that Dr. Feiler was instructed by the police to meet with Ritholz but not to lead him or entrap (him) that he was not to agree to do anything for Ritholz, but was to accept any money offered for use as evidence. (184a) The petitioner telephoned Dr. Feiler and conversed with him, and went to Dr. Feiler's room and there a conversation ensued between them. (185a - 186a) Petitioner brought up the Sanchick case, asked Dr. Feiler what he could do about washing it out and Feiler replied he did not know whether he could do anything as he was only one member of the board. (186a) Petitioner asked Dr. Feiler if he thought half a dozen lawsuits would help and suggested that he would sue the board members as individuals in Federal Court so that they would have to hire attorneys and would be subject to a lien and judgment. Ritholz asked Dr. Feiler if the board members "scare pretty good." Dr. Feiler replied he did not think so and that in the course of the conversation Dr. Feiler said he did not understand what the defendant wanted him to do, and that the petitioner replied "I want you to do just like anything else. You know what to do. Find a way to wash it out. Instead of the lawyers getting the money, I give it to you. It is just as simple as that." (187a - 188a - 396a - 533a - 534a) Ritholz made all the arrangements for the meeting in Lansing where the bribe transaction took place. At the time the bribe was paid, it was Ritholz who offered the bribe and suggested what procedure should be followed by the board to dismiss the Sanchick case, as the Supreme Court of Michigan points out in its opinion.

In view of the cited testimony, the court's instruction was in accordance with the rule laid down in *People v Smith*,

296 Mich 176 at 182, in which the court quoted *Butts v U. S.*, 273 Fed. 35 (18 ALR 143) to the following effect:

> "Where the criminal intent originates in the mind of the defendant, the fact that the officers of the government used decoys or truthful statements to furnish opportunity for or to aid the accused in the commission of a crime, in order successfully to prosecute him therefor, constitutes no defense to such a prosecution."

As a result, the court in this *Smith* case held that defendants were not inspired into crime by police authorities; they merely furnished opportunity or aid in furtherance of an already completed conspiracy in order to acquire evidence of the contemplated crime.

The *Smith* case, we believe, is on all fours with the instant case and refutes defendant's claim of entrapment.

See also *United States v Cerone*, 150 F 2d 382; cert. denied, 66 S. Ct. 98, in which the facts were paralled to those of the instant case and in which the court held, furthermore, there was no entrapment.

From the above it is clear that the trial "court was correct in his comment to the effect that he could remember no evidence which showed that the officers of the law personally or through Board members induced or persuaded the defendant initiated the proceedings which led to the bribe attempt and it was not until then that the officers furnished him with the opportunity he sought of bribing the board." (p. 82). The Court's charge was therefore proper and in accord not only with Michigan rulings but Federal rulings also. No Federal or State rights of respondent were violated thereby.

CONCLUSION

Petitioner was given a fair and impartial trial. He was well and ably represented by counsel, took the stand himself, produced numerous witnesses in his behalf, and cross examined all the People's witnesses at length. He was thus able to present to the jury all the evidence which was available to him. The trial Court was fair and impartial in its treatment of petitioner and its instructions to the jury, which found him guilty.

Proof of petitioner's guilt was overwhelming. Witnesses testified who participated in the transaction, and most important of all, petitioner admitted that he attempted to bribe the board members. He sought to evade the consequences of his admission by presenting the claim that he made the bribe attempt in order to obtain evidence which would be used by him to entrap the board members in order to prevent further extortion upon him. The jury disbelieved this story, and we agree that their verdict was proper. A significant factor which we believe contributed to the jury's conclusion that petitioner's story was incredible, is this: Petitioner, an experienced and successful businessman — and a lawyer in the bargain — admitted on the stand that at no time did he use the simple and common sense means of protecting himself which were in his power — that is, the filing of a complaint with law enforcement officers, either in Illinois or Michigan, who would have used all resources of both States to protect him.

RELIEF

For the above reasons, it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 468

BENJAMIN D. RITHOLZ,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN,
Respondent

PETITIONER'S REPLY TO RESPONDENT'S BRIEF

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF

There are several matters raised in respondent's brief which require reply.

1. Respondent asserts that on August 3, 1955, Feiler told the State police and the Assistant Attorney General, "• • • that Ritholz expressed a desire to come to Michigan to offer a bribe. • • •" (Resp. Br. p. 11.)

This assertion would be important if true. It is not true, and the record page (208a) cited by respondent to support the assertion, fails to bear it out.

2. Respondent asserts that petitioner "on cross-examination admitted the bribery of the state officials (505a to 591a)" (Resp. Br. p. 20). This assertion is also untrue. Petitioner admitted making the payments to the Board members. He did not testify that these payments constituted bribery.

But even if bribery had been admitted, if it resulted from entrapment, petitioner could not be constitutionally convicted.

> "The Courts refuse to convict an entrapped defendant, not because his conduct falls outside the proscription of the statute, but because, *even if his guilt be admitted*, the methods employed on behalf of the government to bring about conviction cannot be countenanced." (Emphasis supplied.) *Sherman v. United States*, 356 U. S. 369, concurring opinion at p. 380.

Also see *United States v. Echols*, 253 Fed. 862 where the defendant was discharged after pleading guilty, and *United States v. Healy*, 202 Fed. 349 where sentence was set aside and the defendant discharged; in both cases the Court acted after it was shown that the defendant had been entrapped.

3. Respondent argues that petitioner did not raise the issue of denial of due process arising from entrapment in his brief in the Michigan Supreme Court, as a Federal issue (Resp. Br. p. 24). Petitioner has shown that he did properly raise the issue (Pet. for Cert. p. 14).

The concern of the Courts that the judicial process not be used to convict an entrapped person was expressed in the concurring opinions in the two leading cases in this Court.

In *Sherman v. United States*, 356 U. S. 386, the concurring opinion stated:

> "The protection of its functions and the preservation of its own temple belongs only to the Court. It is the province of the Court and the Court alone to protect itself and the government from such prostitution of the criminal law. The violation of the principles of justice by the entrapment of the unwary into crime *should be dealt with by the Court no matter by whom or at what stage of the proceedings the facts are brought to its attention.*" (Emphasis supplied, at p. 385.)

And in *Sorrells v. United States*, 287 U. S. 435, the concurring opinion stated:

> "Proof of entrapment AT ANY STAGE of the case, requires the Court to stop the prosecution, direct that the indictment be quashed, and the defendant set at liberty." (Emphasis supplied, at p. 457.)

Respectfully submitted,

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Dated: Detroit, Michigan,
November 7, 1960.